187 (2)

No. 10-987

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

AFFILIATED COMPUTER SERVICES, INC.,

Petitioner,

v.

JOSHUA G. FENSTERSTOCK

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Defendant-Petitioner Affiliated Computer Services, Inc. ("ACS") petitioned this court for certiorari on the ground that this case presented the same issue as was presented in *AT&T Mobility v. Concepcion*, No. 09-893, __ U.S. __, 2011 U.S. LEXIS 3367 (Apr. 27, 2011) (herinafter "*ATTM*"). Since the filing of the petition, the Court has ruled in *ATTM* that the California Supreme Court rule in *Discover Bank* presented an obstacle to the enforcement of the Federal Arbitration Act, 9 U.S.C. 1, *et seq.*, and therefore the *Discover Bank* rule was preempted to the extent it manufactured class arbitration. Thus, the issue on appeal as framed by Defendant ACS has now been considered and addressed by this Court. Plaintiff-Respondent ("Respondent") Joshua G. Fensterstock respectfully requests that certiorari be denied so that consideration of the factors that distinguish this case from *ATTM* can be addressed by the lower courts.

Further, ACS's petition should be summarily denied by this Court. ACS did not raise preemption of *Discover Bank* in the District Court. *See* App.5a (District Court's order denying ACS's motion to compel arbitration stated "[i]t should be noted that Defendants do not address *Discover Bank* [*v. Superior Court*, 36 Cal. 4th 148 (Cal. Sup. Ct. 2005)]"). Therefore, ACS cannot raise preemption here. *McCoy* v. *Massachusetts Inst. of Technology*, 950 F.2d 13, 22 (1st Cir. 1991) ("It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal" for "[o]verburdened trial judges cannot be expected to be mind readers"); *Corley v. United States*, 129 S. Ct. 1558, 1570 (U.S. 2009); *KSR*

Int'l Co. v. Teleflex Inc., 550 U.S. 398, 423-25 (2007); Sup. Ct. Rule 15(2).[1]

This case also has many material distinctions from *AT&T* that require a different analysis, including but not limited to (1) the failure of the agreement in this action to provide for the consumer-friendly procedures and generous remedies that were provided in the *ATTM* contract; and (2) as Respondent argued below, ACS was not a party to the relevant contract and was unknown to the Respondent until months after he entered into the contract with Education Finance Partners who, for all practical purposes, no longer exists after its Chapter 7 bankruptcy was closed, and thus ACS may not properly move to compel arbitration. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006); *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354 (2d Cir. 2008). However, such issues are more appropriately addressed in a lower court.

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1. Although the Second Circuit chose to address ACS's waived preemption argument, Plaintiff can argue waiver in this Court. *Granfinanciera v. Nordberg*, 492 U.S. 33, 38-39 (U.S. 1989) ("Without cross-petitioning for certiorari, a prevailing party may, of course, defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals, provided that an affirmance on the alternative ground would neither expand nor contract the rights of either party established by the judgment below.") (citation and quotation marks omitted).

CONCLUSION

ACS's petition for certiorari should therefore be denied. The parties should be permitted to brief the issues raised herein, and others that would be more appropriately raised in a lower court, for initial consideration.

Respectfully submitted,

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